No. 06-236

In the Supreme Court of the United States

OSCAR MANUEL GARCIA Y GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Maritime Drug Law Enforcement Act falls within Congress's constitutional authority under the High Seas Clause, Art. 1, § 8, Cl. 10.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the *Federal Reporter*, but is reprinted in 182 Fed. Appx. 873. The opinion of the district court (Pet. App. A8-A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2006. The petition for a writ of certiorari was filed on August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of possessing five kilograms or more of cocaine with the intent to distribute it, in violation of 46 U.S.C. App. 1903(a) and (g), and 21 U.S.C. 960(b)(1)(B)(ii). Pet. App. A2-A3. The district court sentenced petitioner to 168 months of imprisonment. *Id.* at A3. The court of appeals affirmed. *Id.* at A1-A7.

1. On March 7, 2004, a United States Coast Guard (USCG) team on board the USCG Cutter *Boutwell* intercepted F/V *El Almirante*, a vessel registered with Guatemala. The interception occurred in international waters approximately 250 miles off the coast of Costa Rica. The Coast Guard team made the interception because it had reason to believe that the *El Almirante* was on course to meet a Columbian-flagged vessel that was engaged in drug trafficking. After obtaining consent from the Government of Guatemala, the Coast Guard boarded the *El Almirante* and found more than 2500 kilograms of cocaine. Petitioner and several co-defendants were arrested on board. Petitioner was later identified as the captain of the *El Almirante*. Pet. 1-2; Pet. App. A2; PSR para. 9.

2. Petitioner and his co-defendants were charged with possessing five kilograms or more of cocaine with the intent to distribute it, and with conspiracy to commit the same offense, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. App. 1903(a) and (g), and 21 U.S.C. 960(b)(1)(B)(ii). The MDLEA makes it "unlawful for any person * * * on board a vessel subject to the jurisdiction of the United States * * * to knowingly * * * possess with intent to * * * distrib-

ute[] a controlled substance." 46 U.S.C. App. 1903(a). The term "vessel subject to the jurisdiction of the United States" is defined to include "a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. App. 1903(c)(1)(C).

In the district court, petitioner filed a motion to dismiss for lack of jurisdiction, arguing that the United States Constitution does not grant Congress the authority to criminalize conduct by foreign nationals aboard foreign vessels with no nexus to the United States. Pet. App. A2-A3. After the district court denied his motion, petitioner entered a conditional plea of guilty to the possession offense, preserving his right to appeal the court's denial of his motion to dismiss. *Id.* at A3. The district court sentenced petitioner to 168 months of imprisonment. *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A7. The court rejected petitioner's argument that the MDLEA is unconstitutional as applied to the drug trafficking conduct of foreign nationals on foreign vessels on the high seas where there has been no showing of a specific nexus between that conduct and the United States. *Id.* at A3-A7. The court held that the High Seas Clause, Art. 1, § 8, Cl. 10, authorizes Congress to forbid conduct that "has a potentially adverse effect" on the United States and that "is generally recognized as a crime by nations that have reasonably developed legal systems." Pet. App. A7. The court concluded that the MDLEA falls within that authority because "drug trafficking aboard vessels (1) 'is a serious international problem and is universally condemned' and (2) 'presents a specific threat to the security and societal well-being of the United States.'" *Ibid.* (quoting 46 U.S.C. App. 1902).

ARGUMENT

Petitioner contends (Pet. 5) that Congress may prohibit conduct under the High Seas Clause only if that conduct directly affects the United States' relations with foreign powers. Petitioner further contends (Pet. 11) that the MDLEA fails to satisfy that standard as applied to drug trafficking by a foreign national on a foreign vessel absent a showing that the drugs were destined for the United States. Petitioner's contentions are without merit and do not warrant review.

1. The High Seas Clause of the Constitution vests in Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. By its terms, the High Seas Clause authorizes Congress to punish any felony committed on the High Seas, without limitation. There is no requirement that the felony prohibited must have some demonstrated effect on the United States' relations with foreign powers. Nor is there any requirement that the felony prohibited must be one that, unless interrupted, would result in criminal conduct in the United States.

Furthermore, whatever the outer limits of Congress's power under the High Seas Clause, the MDLEA falls comfortably within that authority. As Congress found, drug trafficking aboard vessels in international waters is a serious international problem that is widely condemned by nations throughout the world and such trafficking presents a serious threat to the United States. 46 U.S.C. App. 1902. Moreover, the MDLEA applies to a foreign national aboard a vessel in international waters that is registered in a foreign nation only "where the flag nation has consented or waived objec-

tion to the enforcement of United States law by the United States." 46 U.S.C. App. 1903(c)(1)(C). In those circumstances, the MDLEA plainly falls within Congress's authority under the High Seas Clause.

Consistent with that understanding, every court of appeals that has considered the question has held that the MDLEA falls within Congress's authority under the High Seas Clause. *United States* v. *Estupinan*, 453 F.3d 1336, 1338-1339 (11th Cir. 2006) (rejecting claim that Congress exceeded its authority under the High Seas Clause in enacting the MDLEA); *United States* v. *Ledesma-Cuesta*, 347 F.3d 527, 531-532 (3d Cir. 2003) ("Congress had authority to enact [the MDLEA], pursuant to its constitutional power to: 'define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations.'"); *United States* v. *Moreno-Morillo*, 334 F.3d 819, 824 (9th Cir. 2003) (rejecting defendants' contention that "drug-trafficking is not among the felonies and piracies on the high seas that Congress is empowered to define under Article I, Section 8, Clause 10 "), cert denied, 540 U.S. 1156 (2004). *United States* v. *Kurdyukov*, 48 Fed. Appx. 103 (5th Cir. 2002) (holding that the High Seas Clause permits application of the MDLEA to foreign nationals outside the United States territorial jurisdiction), cert. denied, 537 U.S. 1130 and 538 U.S. 909 (2003).

Petitioner's reliance (Pet. 12, 14) on *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818) and *United States* v. *Furlong*, 18 U.S. (5 Wheat.) 184 (1820), is misplaced. Neither of those decisions involved constitutional interpretation of the High Seas Clause; they were concerned, instead, with statutory interpretation of Section 8 of a 1790 "act for the punishment of certain crimes against

the United States," which criminalized piratical murder. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113-114.

Indeed, although this Court in *Palmer* concluded that Congress had not intended the 1790 Act to extend to murder committed upon the high seas by one foreign crew member against another aboard a foreign vessel, the Court affirmed that Congress had authority under the High Seas Clause to prohibit such conduct. In framing the question before the Court, Chief Justice Marshall stated:

> The constitution having conferred on congress the power of defining and punishing piracy, *there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States*. The only question is, has the legislature enacted such a law?

Palmer, 16 U.S. (3 Wheat.) at 630-631 (emphasis added).

That analysis applies equally to Congress's authority to punish felonies committed on the high seas. As the Fifth Circuit has explained in an opinion upholding the MDLEA as a valid exercise of Congress's authority under the High Seas Clause, "while at issue [in *Palmer*] was Congress' power to define and punish *piracies*, Chief Justice Marshall's assessment should apply with equal weight to *felonies* such as at issue here, a parallel provision within the same constitutional clause." *United States* v. *Suerte*, 291 F.3d 366, 374 (5th Cir. 2002).

2. Petitioner next contends (Pet. 19-21) that this Court's review is warranted to resolve a conflict in the circuits on whether due process requires a showing that conduct violating the MDLEA has a specific nexus to the

United States. Review of that question is not warranted in this case.

Four courts of appeals have correctly held that due process does not require a showing of such a nexus. See, *e.g.*, *United States* v. *Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003), cert. denied, 541 U.S. 1035 (2004); *Suerte*, 291 F.3d at 372; *United States* v. *Cardales*, 168 F.3d 548 (1st Cir.), cert. denied, 528 U.S. 838 (1999); *United States* v. *Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993), cert. denied, 510 U.S. 1048 (1994). As the Fifth Circuit explained in *Suerte*, 291 F.3d at 372, "'where the flag nation has consented or waived objection to the enforcement of United States law by the United States' * * * due process does not require a nexus for the MDLEA's extraterritorial application." And, as the Third Circuit stated in *Martinez-Hidalgo*, 993 F.2d at 1056, "[i]nasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas."

In *United States* v. *Perlaza*, 439 F.3d 1149, 1160 (2006), however, the Ninth Circuit held that "where the MDLEA is being applied extraterritorially * * * due process requires the Government to demonstrate that there exists a sufficient nexus between the conduct condemned and the United States such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant" (internal quotation marks and citation omitted). There is therefore a conflict in the circuits on that due process issue.

This case, however, is an inappropriate vehicle for resolving that conflict because petitioner did not raise a due process challenge to his conviction in the district

court or the court of appeals, and neither of those courts passed on that issue. This Court does not ordinarily review claims that were neither properly raised nor passed upon below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). There is no reason to depart from that practice here.

Moreover, because petitioner did not preserve a due process objection in the district court, such a claim could be reviewed only for plain error. See Fed. R. Crim. P. 52(b). *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). Under the plain error standard, a defendant must show that the alleged error committed by the district court is "obvious." *Id.* at 734. As discussed above, there is no merit to the argument that due process requires a showing of a specific nexus between the conduct prohibited by the MDLEA and the United States. At the very least, however, because there is no Supreme Court precedent supporting such a requirement and four circuits have rejected it, such a requirement could not possibly be "obvious." *United States* v. *Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999) (no plain error given circuit split and absence of controlling Supreme Court precedent); *United States* v. *Williams*, 53 F.3d 769, 772 (6th Cir. 1995) (in general, a circuit conflict "precludes a finding of plain error"), cert. denied, 516 U.S. 1120 (1996).

3. Finally, petitioner argues (Pet. 22-24) that interpreting the High Seas Clause to authorize application of the MDLEA to foreign vessels without a specific nexus to the United States could have adverse effects on foreign policy. But Congress is entrusted with the responsibility to take into account the foreign policy implications of its exercises of authority under the High Seas Clause, and it has concluded that foreign policy is ad-

vanced rather than harmed by a prohibition on drug trafficking in international waters. It is for the political branches, not petitioner or the courts, to balance such foreign policy considerations. See *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005) (rejecting claim that wire fraud prosecution should be barred to avoid "international friction:" "This action was brought by the Executive to enforce a statute passed by Congress. In our system of government the Executive * * * has ample authority and competence to manage the relations between the foreign state and its own citizens and to avoid embarrassing its neighbors. * * * The greater danger, in fact would lie in our judging this prosecution barred based on the foreign policy concerns animating the revenue rule, concerns that we have neither aptitude, facilities nor responsibility to evaluate.") (internal quotation marks, citations, and brackets omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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